No. 85-826

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of
Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent Brookhaven National Laboratory ("Brookhaven")[1] submits this brief in

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[1] Brookhaven National Laboratory is operated by Associated Universities, Inc. ("AUI"), a not-for-profit corporation organized under the education laws of the State of New York. Institutions of higher education represent-

(Footnote continued)

opposition to the petition for writ of certiorari of Petitioner Michaela Beresteanu Golin ("Golin") to review the judgment of the United States Court of Appeals for the Second Circuit, entered April 19, 1985. That judgment (A 1a-2a) affirmed the dismissal after trial of Golin's complaint "substantially for the reasons" set forth in the district court's unreported Memorandum and Order, dated January 26, 1984 (A 3a-39a).

STATEMENT OF THE CASE

This case involves Golin's sex discrimination and sexual harassment claims, which were concocted only after she was informed that her appointment at Brookhaven

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(Footnote 1 continued from previous page)
ed on AUI's Board of Trustees are as follows: Columbia University, Cornell University, Harvard University, John Hopkins University, Massachusetts Institute of Technology, Princeton University, University of Pennsylvania, University of Rochester, Yale University.

would not be extended. After a four-day bench trial, the district court entered judgment against Golin dismissing on the merits her complaint of sex discrimination, sexual harassment and retaliation in connection with her two-year employment as a Brookhaven Research Associate. That judgment was supported by extensive and detailed Findings of Fact (A 4a-26a) and Conclusions of Law (A 27a-38a), and it was affirmed in all respects by the Second Circuit after a full briefing by both parties.

Notwithstanding the ample consideration given her meritless claims, Golin petitions for yet another review by this Court. Her petition merely continues her relentless pursuit of imagined wrongs. It raises no question warranting Supreme Court review, but merely reiterates factual and legal contentions rejected by two courts below.

Each of Golin's allegations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., includ-

ing those of purported sexual harassment, were properly adjudicated in accordance with established law as to which all courts of appeals are in agreement. Moreover, the sexual harassment issue before this Court in PSFS Savings Bank v. Vinson, 106 S. Ct. 57 (Oct. 7, 1985) (No. 84-1979), granting cert. to Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), has no application to Golin's case, which, as is explained below (see pp. 18-25 infra), was properly decided on the basis of legal principles about which there is no conflict among the courts of appeals. Therefore, even if this Court were to approve Vinson's atypical formulation of an employer's vicarious liability for sexual harassment by supervisory personnel, that would have no bearing on this case.

Accordingly, Golin's petition for writ of certiorari should be denied.

STATEMENT OF FACTS

Golin's purported statement of facts improperly attempts to embroil this Court in factual contentions already decided in Brookhaven's favor by the district court. The true facts, as found by the district court, are fully set forth in its Memorandum and Order. (A 3a-38a.) As is most pertinent to the instant petition, the facts may be summarized as follows.

Golin's Position at Brookhaven

Brookhaven employed Golin as a post-doctoral Research Associate, a junior, entry-level training position. (A 5a.) Customarily, the position is held for one year and renewed for a second, but was never extended beyond that for Research Associates, like Golin, working in a theoretical discipline. (A 5a, A 9a-10a.)

After termination of their appointments (A 10a), Brookhaven's Research Associates normally obtain positions at other institutions. Promotion from the position of Research Associate to a permanent posi-

tion on Brookhaven's scientific staff is extremely rare; in the Nuclear Theory Group, to which Golin belonged, only one such promotion has ever occurred since before 1970. (Id.)

Allegations of Sexual Harassment

During Golin's time at Brookhaven, the Group Leader of the Nuclear Theory Group of the Physics Department was Dr. Sidney H. Kahana, who was one of three senior scientists in the Nuclear Theory Group. (A 10a-11a.) Although Kahana was nominally Golin's supervisor, he had no special authority over Dr. Golin's work or employment status; nor did he assign work to Golin or control with whom she collaborated. (Id.)

In December 1976, Golin was offered the opportunity to collaborate with either Kahana or one of the other senior scientists on their respective research projects. (A 12a.) She chose to work with Kahana and, thereafter, met frequently with him from January through approximately April 1977, when she withdrew from active

collaboration with Kahana. (A 12a-13a.) Golin alleges that during this period of time, she was subject to sexual harassment by Kahana. (Id.)

The incidents alleged by Golin to have occurred were of three types: nudges by Kahana's knee or elbow; remarks which Golin interpreted to be of a sexual or provocative nature; and an incident of touching or pointing to Golin's waistline in connection with Golin's comment that the cafeteria food was causing her to gain weight. (Id.) Significantly, it was admitted at trial and found by the district court that Golin "was not sure whether Kahana's prior conduct had any sexual connotations" until six months after the fact, when she learned her appointment was not being renewed. (A 21a-22a (emphasis added).) The District Court found it unnecessary to determine whether these alleged incidents of harassment actually took place, because it concluded, on other grounds, that Golin had failed to prove her case. (A 12a-13a; A 27a-38a.)

Brookhaven's Decisions as to Golin's Continued Employment

Following the one-year extension, Golin's appointment as a Research Associate was scheduled to expire on October 4, 1978. (A 14a.) In the fall of 1977, Kahana reminded Golin that her temporary Research Associate position would end the following October and that she should begin making inquiries for future employment.

Subsequently, Golin learned that Dr. D.J. Millener, who had been hired by Brookhaven as an Assistant Physicist, was being promoted to Associate Physicist. (A 15a.) Millener originally had been hired as a member of the scientific staff, which unlike Golin's position, was a "tenure track" appointment. (A 15a-16a.) His promotion was in accordance with normal progression, based entirely on his own ability, and unrelated to Golin's employment at Brookhaven. (Id.) Millener's advancement did not create a vacancy to which Golin could have been promoted. (A 16a.)

Golin's Failure to Complain of the Alleged Harassment

In December 1977, Golin met, at her request, with the then-Chairman of the Physics Department, Dr. Nicholas P. Samios, and the Assistant Chairman of the Physics Department, Dr. Martin Blume, who had primary responsibility for personnel matters. (A 17a; A 13a-14a.) At that meeting, Golin stated her disagreement with the decision not to extend her Research Associate appointment for a third year and her belief that Kahana's evaluation of her work was unfair. (A 17a.) Golin did not state, however, that there were any problems in her personal relationship with Kahana and made no mention of harassment, sexual or otherwise. (Id.) In fact, Golin did not complain about sexual harassment or any personal problems with Kahana to anyone with supervisory responsibility at Brookhaven at any point during 1977. (A 13a-14a.) Nor did she ever complain to Brookhaven's affirmative action personnel, though the

availability of such avenues of redress were well publicized. (Id.)

During the December meeting, Samios and Blume undertook to review the decision not to extend Golin's appointment. (A 17a.) Subsequently, they discussed Golin's work individually with each of the three senior scientists of the Nuclear Theory Group, who all agreed that Golin should be neither continued nor promoted. (A 18a.) Moreover, Samios and Blume conducted their own review of Golin's publications and came to the same conclusion. (Id.)

In February 1978, Samios and Blume met with Golin. They advised her of the results of their review and offered assistance in her finding a position elsewhere. (A 19a.) At that meeting, Golin alleged for the first time that she was being harassed by Kahana. (A 19a-20a.) The "harassment" she referred to, however, had nothing to do with what she later characterized as sexual harassment in January

through April 1977, but rather referred only to Kahana's Fall 1977 reminders that Golin should be seeking employment at other institutions. (A 19a-20a; A 14a-15a.) Because of Golin's complaints about Kahana, it was decided that she should work under the direction of another senior scientist of the Nuclear Theory Group, and additional efforts were made to assist Golin in finding future employment. (A 20a.)

In late June 1978, Golin met again, at her request, with Samios and Blume. (A 20a-21a.) She stated that she had learned that an affirmative action representative from the Department of Energy would be coming to Brookhaven and that she wanted to speak to him about the sexual discrimination and sexual harassment she had allegedly experienced. <u>This was the first time Golin had ever mentioned to Blume or Samios that she had been subject to sexual harassment by Kahana</u>. (A 21a.) Even then, however, her allegations were vague: Samios and Blume asked Golin to

identify the nature of the alleged sexual harassment, but Golin refused to give specifics. (A 22a.)

Golin's Failure to Cooperate With Brookhaven's Investigation

Immediately following receipt of Golin's June 1978 allegations of sexual harassment, Brookhaven began its investigation. In particular, Samios and Blume confronted Kahana with Golin's charges. (A 22a-23a.) Kahana denied emphatically that he had ever sexually harassed Golin and asked for details of her allegations; Blume and Samios, of course, had no details to supply. (Id.)

Following her June meeting with Samios and Blume, Golin wrote a letter to Brookhaven's Director, Dr. George H. Vineyard, in which she reasserted sexual harassment and sexual discrimination allegations. (A 23a.) Vineyard promptly responded by appointing a Committee to investigate. (A 24a.) A Committee hearing was scheduled for August 1978 but was cancelled after

Vineyard received a letter from Golin's attorney stating that she would not attend. (A 24a-25a.) Brookhaven then discontinued its investigation of Golin's sexual harassment allegations because of her own refusal to cooperate with the Committee's investigation. (Id.)

In September 1978, Samios met with Golin and discovered that she still was not making any real effort to find other employment opportunities. (A 25a.) Consistent with Brookhaven's regular practice, Samios gave Golin a final, three-month extension of her employment to assist her in finding another job. (Id.) Thereafter, for nine months following her termination, Golin continued to work on her own projects with research scientists on Brookhaven's staff and to use its facilities, though she neither sought nor obtained the appropriate authorizations. (A 26a.)

REASONS FOR DENYING THE WRIT

1. The District Court Properly Applied the Title VII Burden of Proof.

Golin contends that the district court misinterpreted this Court's teaching in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), concerning the role of prima facie case and the burden of proof in Title VII cases. (Pet. at 22-26.)[2] That issue was not raised below.[3] Moreover, even a cursory reading of the district court's decision shows that it fully engaged in the level of factual specificity required by Aikens and its precursors. Indeed, the district court expressly noted its awareness of -- and its intention to apply -- Aikens' teachings to Golin's case. (A 39a.) In any event, the

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2 As used herein "Pet." refers to Golin's Petition for Writ of Certiorari, dated November 8, 1985.

3 Golin's 49-page brief to the court of appeals does not even cite Aikens, on which she here relies.

district court's purported misinterpretation of Aikens is hardly a question substantial enough to command Supreme Court review.

2. The Court of Appeals' Affirmance Is Fully Consonant With Decisions of All Other Courts of Appeals as to Elements of a Title VII Claim for Sexual Harassment by Supervisory Employees.

a. No new question of law is raised by the decision below.

The existence of a Title VII claim for sexual harassment by supervisory personnel is now well settled in the courts of appeals. The district court's decision here merely applied that established law to the facts of this case. Moreover, this Court will address the question of sexual harassment under Title VII in PSFS Savings Bank v. Vinson, and Golin's case raises no legal or factual issue not already present there. Indeed, Golin's case would be a particularly inapposite vehicle for Supreme Court consideration of this issue because, by the facts found at trial, Golin has no claim for sexual harassment under the standards

established by any of the courts of appeals.

b. The decision below is completely consistent with all courts of appeals as to the elements of a claim of sexual harassment under Title VII.

All courts of appeals are agreed that claims for sex-based discrimination under Title VII by virtue of sexual harassment fall into two distinct categories: (1) that the employee suffered an adverse employment decision or loss of a tangible job benefit as a consequence of her response to sexual harassment or (2) that the sexual harassment was of such nature and magnitude as to create a hostile, intimidating or offensive work environment. See Henson v. City of Dundee, 682 F.2d 897, 901-02, 908-09 (11th Cir. 1982); accord Vinson v. Taylor, 753 F.2d at 144-45; Phillips v. Smalley Maintenance Services, 711 F.2d 1524, 1528-29, (11th Cir. 1983); Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934, 943-48 (D.C. Cir. 1981); Ferguson v. E.I. DuPont de Nemours &

Co., 560 F. Supp. 1172, 1196-99 (D. Del. 1983).

The district court's decision, as affirmed by the court of appeals, was fully consonant with this established law and recognized that sexual harassment of either kind is, in a proper case, actionable under Title VII. (A 29a-30a.) Nor did the district court deny that employers could be vicariously liable for sexual harassment commited by their supervisory employees provided the other elements of a sexual harassment claim are met. The decision below merely applied this law to the facts it found, concluding that Golin failed to prove her case.[4]

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[4] Golin persists here in disputing the district court's findings, even though the court of appeals has already rejected her contentions that such findings were "clearly erroneous."

c. The district court's conclusion that Golin failed to prove liability for purported sexual harassment under a hostile-work-environment theory is not inconsistent with the law of any circuit.

Only three courts of appeals have directly addressed the elements of a claim for sexual harassment by a supervisor under a hostile-work-environment approach. Two of those courts have held that employees alleging sexual harassment of this sort must prove, as an essential element of their claim, that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Katz v. Dole, 709 F.2d at 255; Henson v. City of Dundee, 682 F.2d at 905.

Following this authority, the district court dismissed Golin's claim of sexual harassment predicated on the maintenance of a hostile work environment because she failed to prove that Brookhaven officials "in any way condoned or acquiesced in [Kahana's] alleged sexual harassment." (A 33a-34a.) In particular, the court found that Brook-

haven had neither actual nor constructive notice of the alleged harassment until a year after it had ceased; that Brookhaven officials reacted promptly to Golin's complaints and that their efforts to investigate the charges and, if necessary, to remedy them were thwarted by Golin's own refusal to cooperate in the investigation. (A 34a-35a.)

Golin argues that the District of Columbia Court of Appeals' decision in Vinson is to the contrary (Pet. at 36-39) and thereby insinuates a conflict among the circuits warranting Supreme Court review.[5] Such reasoning fails because Golin's case

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[5] Golin is wrong in stating (Pet. at 34-35) that the decision below conflicts with Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). Each of those cases involved sexual harassment of the tangible-job-detriment variety, for which different standards apply. Even the Vinson court recognized that theories of vicarious liability could not be automatically transferred from that context to cases involving only the hostile-work-environment kind of sexual harassment.

is distinguishable from Vinson on its facts.

First, the Vinson court's decision was predicated on the existence of "pervasive on-the-job sexual harassment . . . that illegally poisoned the 'psychological and emotional work environment.'" 753 F.2d at 145 (footnote omitted); cf. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3)(1985) (sexual harassment requires "purpose or effect of unreasonably interfering with an individual's work performance"). In particular, the sexual harassment alleged in Vinson involved the explicit requests for sexual favors, forced submission to sexual advances, assault, rape, intrusions on privacy, and exhibitionism. 753 F.2d at 143-44. Nothing like that occurred here.

The only alleged touchings involved "[n]udges" by Kahana's knee or elbow or, in one alleged incident, the touching or pointing to Golin's waistline in response to her comment about the cafeteria food.

(A 12a-13a.) Further, the comments which Golin construed to be "sexual" or "provocative" were worlds apart from the "'sexually stereotyped insults' or 'demeaning propositions'" referred to in Vinson. 753 F.2d at 145.[6] Golin herself did regard this conduct as having "any sexual connotations" until at least six months after the fact. (A 22a.)

Thus even if something that could be labeled "sexual harassment" occurred in Golin's case, it was hardly the kind of conduct that "'so heavily polluted'" the work environment "'as to destroy completely the emotional and psychological stability'" of female workers. Bundy v. Jackson, 641 F.2d

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6 For example, Golin testified that at one time Kahana pointed to the letters "FK" on a computer print-out and laughed. Tr. (Nov. 30, 1983) at 56. The only other specific incident of "sexual" or "provocative" language to which Golin testified involved Kahana's alleged statement that another female research associate was "more willing." Id. Kahana, of course, denied both incidents. Tr. (Dec. 1, 1983) at 107, 123-25.

934, 944 (D.C. Cir. 1981) (quoting Judge Goldberg's opinion in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (ethnic harassment)). In this case, the district court expressly acknowledged that "a showing of pervasive harassment can in an appropriate case give rise to" vicarious Title VII liability, but concluded that "no such showing of pervasive harassment was made here." (A 34a-35a.)[7]

Second, Vinson was predicated on the conduct of a bank branch manager who was vested with such authority over employees as to be "an 'agent' of the employer" for

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[7] Unlike Vinson, wherein the district court precluded evidence as to alleged sexual advances toward other female employees in the plaintiff's case in chief, 753 F.2d at 144, the district court here gave Golin ample opportunity to substantiate her allegation that Kahana had "molested" other women at Brookhaven. The court nonetheless expressly found that "no other [Brookhaven] employee experienced sexual harassment or voiced any complaint." (A 35a.)

purposes of Title VII. 753 F.2d at 148-50. Even accepting Vinson's extension of this agency theory to individuals less "richly endowed" with employment-related power, id. at 150, the alleged harasser here is not the kind of "supervising superior" referred to by the Vinson court.

Thus, for example, the decision of whether or not even to work with Kahana, as opposed to some other senior scientist, was made by Golin herself, as was the decision to withdraw from such collaboration four months later. (A 12a, 13a.) Indeed, as the district court expressly found, Kahana had "no special authority over Dr. Golin's work or employment status," and "did not assign work to Dr. Golin or control with whom she collaborated." (A 11a.) In addition, the particular employment decisions of which Golin complained -- the failure to renew her Research Associate position for a third full year or to promote her to the scientific staff -- were both matters Kahana did not control. (A 23a.) In sum,

Kahana's ability to influence Golin's employment was less than that of a college department chairman vis-a-vis a non-tenured professor, and such a relationship by itself is not a sufficient predicate of employer liability for sexual harassment. Fisher v. Flynn, 598 F.2d 663, 665-66 (1st Cir. 1979).

Third, under Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) -- a decision that, like Vinson, was authored by Circuit Judge Robinson -- employers "may be relieved from responsibility under Title VII" for sexual harassment by supervisory employees where, as here, the conduct violated employer policy without the employer's knowledge and "the consequences are rectified when discovered." Id. at 993 (footnote omitted). Here, however, unlike Vinson and Barnes, the purported victim deliberately thwarted Brookhaven's prompt efforts to investigate and, if necessary,

remedy the charge. (A 35a).[8] Golin's refusal to cooperate was not based on fear of reprisal -- Golin had long since been removed from any involvement with Kahana (A 20a) -- but solely because the committee did not have authority to consider Golin's additional claim for a promotion to which she was neither eligible nor qualified (A 25a).

In sum, even if this Court were to sustain Vinson's articulation of the elements of a claim of sexual harassment under the hostile-work-environment theory, that would have no bearing on Golin's case since she failed to prove such a claim even under Vinson's formulation of the law.

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[8] Although it has been said that the failure to pursue internal remedies does not preclude a Title VII action for sexual harassment, Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979), the plaintiff here actually impeded Brookhaven's investigation by refusing to give any specifics of her allegation to any Brookhaven official or to an impartial committee established for that purpose.

d. The district court's conclusion that Golin failed to prove liability for purported sexual harassment under a tangible-job-detriment theory is not inconsistent with the law of any circuit.

There is no conflict among the circuits as to the elements of a claim of sexual harassment under the tangible-job-detriment theory, and certainly no dispute as to the need for the plaintiff to show a causal nexus between her response to the harassment and her job opportunities. See Henson v. City of Dundee, 682 F.2d at 909 (11th Cir. 1982); accord Vinson, 753 F.2d at 144-45 & n.30 (D.C. Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80 (3d Cir. 1983); Katz v. Dole, 709 F.2d at 254 (4th Cir. 1983); Fisher v. Flynn, 598 F.2d at 666 (1st Cir. 1979); Barnes v. Costle, 561 F.2d at 992 (D.C. Cir. 1977); Ferguson v. E.I. DuPont de Nemours, 560 F. Supp. at 1196. Here, Golin made no showing whatsoever that the purported harassment had any effect on her Brookhaven employment. Indeed, the district court expressly so

found: "There was no causal connection between any personal difficulties Dr. Golin may have had with Dr. Kahana and her opportunities for advancement at Brookhaven." (A 16a-17a (emphasis added).)

First, Kahana had no authority over the two specific employment opportunities Golin said she was improperly denied. (Id.) Second, the employment opportunities Golin sought simply were not available to her as a Research Associate completing the second year of her appointment. (A 36a.)[9] In fact, at the time in question, there was no vacancy in the Nuclear Theory scientific staff to which Golin could have been promoted. (A 16a.) Third, the employment de-

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9 As the district court found, (1) no Research Associate in the theoretical group had ever received a third year extension to his or her appointment (A 9a-10a; A 33a) and (2) promotions from the training position of Research Associate to the regular staff are exceedingly rare, being given only to exceptionally qualified individuals, which Golin was not. (A 33a; cf. A 18a.)

cisions in question were independently reviewed and ratified before Golin's allegations on sexual harassment were made. (A 33a; see also A 17a-19a.)

The cases Golin cites (Pet. 48-50) are not in any way inconsistent with the legal conclusions of the district court because, in each of those cases, a causal nexus to an adverse employment decision was shown.[10]

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10 See Horn v. Duke Homes, 755 F.2d 599, 601 (7th Cir. 1985) (employee terminated "because of her refusal to respond to" plant superintendent's sexual advances) (emphasis added); (superintendent "demanded sex as a condition of employment") id. at 604 (emphasis added); Henson v. City of Dundee, 682 F.2d 897, 901 (police dispatcher prevented from attending police academy "because of her refusal to have sexual relations with [chief of police]") (emphasis added); (issue is whether police chief "insisted upon sexual favors as a condition to [plaintiff's] attendance at the academy") id. at 911 (emphasis added); Miller v. Bank of America, 600 F.2d 211, 212 (9th Cir. 1979) (employee "fired because she refused her supervisor's demand for sexual favors") (emphasis added).

3. Golin's Claim of Retaliation Was Fully Considered by the Courts Below.

There is no basis to Golin's contention (Pet. at 61) that her retaliation claim was "overlooked." The gist of Golin's retaliation claim is that adverse employment decisions were made after she complained of Kahana's alleged sexual harassment. But, Golin did not complain of sexual harassment until long after the final determinations as to her renewal or promotion had been made. (A 21a.)[11] Even after that complaint, Brookhaven rendered considerable assistance to Golin. (A 25a-26a.) Moreover, the district court expressly concluded that Brookhaven "articulated legitimate, nondiscriminatory reasons for its de-

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11 Golin improperly persists in her contention that she complained of sexual harassment in December 1977 (Pet. at 63), even though the district court found no such complaint until June 1978. (A 20a-21a; cf. A 17a (finding Golin did not complain of "harassment, sexual or otherwise" in December 1977).)

cision" and that Golin failed to show "by a preponderance of the evidence that such reasons were a pretext for discrimination." (A 36a-37a.) This ultimate conclusion completely resolves not only Golin's sex discrimination and sexual harassment claims but her retaliation claim as well. Finally, it is preposterous to suggest that the court of appeals "overlooked" Golin's retaliation argument, since that was one of four points she expressly argued in her brief to that court.

In sum, the courts below did not disregard Golin's retaliation claim; rather, they found it too frivolous to discuss.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
December 13, 1985

Respectfully submitted,

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